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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

RONALD L. GOLDFARB,
Petitioner,

v.

SUPREME COURT OF VIRGINIA, *ET AL.*,
Respondents.

PETITIONER'S REPLY MEMORANDUM IN SUPPORT OF HIS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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1. Respondents suggest that this Court's decisions striking down state laws under the Commerce Clause generally involved a flat ban excluding out-of-state concerns, whereas the present case involves "reasonable conditions promoting attorney competence" which are imposed on lawyers who are admitted to the state bar without examination. *See* Respondents' Opposition Memorandum ("Opp. Mem.") at i. That is not an accurate characterization either of this case or the applicable case law.

In the first place, there is no evidence in the record to show that Virginia's full-time, in-state practice rule "promote[s] attorney competence." The court of appeals' decision did not rely on the existence of any nexus between the two; instead, the court rested its Commerce Clause analysis entirely on the assumption that admission on motion

was totally within the state's discretion and on the fact that petitioner had the option of taking the Virginia bar examination. *See* Appendix to Petition at 7a-10a.

Second, respondents are simply wrong when they assert that the pertinent Commerce Clause cases relied upon by the petitioner involved absolute barriers to entry, rather than burdensome conditions that were imposed on out-of-state concerns (Mem. Op. at 6-8). Calling a restrictive condition a flat ban does not make it one, and in any event, the characterization makes little difference for Commerce Clause purposes. Even if a state law does not stop commerce at the border, it is still invalid if it imposes conditions which are unduly burdensome in light of the putative local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Moreover, the line between flat bans and burdensome conditions is illusory at best, for even when a statute is written in terms of a ban, there are generally ways that an outside firm can, at least in theory, do business in the state. For example, in *South-Central Timber Development, Inc. v. Wunnicke*, ____ U.S. ____, 104 S. Ct. 2237 (1984), the statute in question seemed to bar the plaintiff lumber company from the bidding, but the ban was not absolute, since the company had the option (albeit a costly one) of building an in-state plant. Similarly, in *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1980), the state had prohibited twin trailers from moving through the state, but the ban could be circumvented if a trucker uncoupled the trailers at the border, transported them singly across the state, and re-coupled them at the other border. Despite the availability of such "alternatives," this Court invalidated the statutes in both cases.

The present case is thus indistinguishable from earlier

decisions striking down similar restrictions, and the goals and intent of the Commerce Clause would be seriously eroded if its applicability were limited to "absolute bars" on out-of-state concerns, however that phrase is defined.

2. Respondents contend that petitioner's Due Process claim is foreclosed by *Brown v. Supreme Court of Virginia,* 359 F. Supp. 549 (E.D. Va.) (three-judge court), *aff'd mem.*, 414 U.S. 1034 (1973), which upheld Virginia's full-time practice requirement in a challenge by a lawyer who intended to "moonlight" in Virginia while retaining his full-time job in another jurisdiction (Opp. Mem. at 5). However, *Brown* does not affect this case.

Prior to ruling on the constitutional issue, the three-judge in *Brown* allowed the Supreme Court of Virginia to re-consider Brown's application. The Virginia court again denied the application, construing its full-time practice rule as requiring an applicant to "show that he intends to open an office in Virginia and to *regularly* engage in the practice of law in this state." *Application of Brown,* 213 Va. 282, 286 n.3, 191 S.E.2d 812, 815 n.3 (1972) (emphasis in original). Although the applicant in *Brown* did not intend to have a "regular" practice in Virginia, the petitioner here intends to open a *bona fide* office in Virginia and to serve Virginia clients on a "regular" basis. *See* Appendix to Petition at 2a-3a.

Respondents' memorandum cites *Brown's* "regular" practice language as the governing construction of Rule 1A:1(d) (Opp. Mem. at 2 n.1). While that may have been an accurate description when *Brown* was decided in 1972, that is not an accurate statement of how the Rule is being administered today. As the present case demonstrates, Virgina is now requiring not just an intent to practice "regularly" in the state, but an intent to practice *exclusive-*

ly in Virginia. Since *Brown* held only that a "regular" practice requirement does not offend the Due Process or Equal Protection Clauses, the case has no bearing on the more restrictive interpretation of the Rule that is now in effect and which is being challenged here.

3. As previously noted, respondents' defense of the full-time practice restriction rests on the claim that the rule promotes lawyer competence (Opp. Mem. at 12). A recent development casts serious doubts on that claim.

Several weeks ago, the Supreme Court of Virginia adopted a new rule (reproduced as an addendum to this memorandum) which requires all members of the Virginia State Bar to take eight hours of continuing legal education courses each year. This requirement applies regardless of whether an attorney was admitted to practice on examination or on motion. This development is relevant both because it tends to cast doubt on the claim that full-time practice is a substitute for a bar examination and because it suggests that the post-admission education is a much more appropriate means of ensuring lawyer competence than is a full-time practice rule. Moreover, if the Virginia Supreme Court should perceive particular problems relating to the competence of motion admittees, it could tailor this program to require all motion admittees to take appropriate courses in Virginia law for whatever period of time seems appropriate. Such a mandatory continuing legal education program would be much more closely tailored to the state's goal of assuring that motion admittees are competent practitioners than the current practice, which excludes qualified lawyers from the motion admission process unless they are willing to abandon their existing practice in another jurisdiction.

4. Finally, respondents' memorandum attempts (at 10

n.4) to distinguish the case of *In re Jadd,* 391 Mass. 227, 461 N.E.2d 760 (1984), which is similar to this case in that the state limited admission on motion to in-state residents. The Massachusetts court noted that its waiver of the examination requirement for some applicants evinced a conclusion that "passing a bar examination is not an essential means in assessing [an attorney's] knowledge of local law or any other qualification for admission to the bar." 391 Mass. at 236, 461 N.E.2d at 766. Respondents assert that *Jadd* is distinguishable since the Virginia Supreme Court does not share this view. This claim is difficult to fathom, however, since Virginia has been admitting attorneys to its bar without examination for almost 80 years. *See* Former Rule XX of the Supreme Court of Virginia, 106 Va. XX (1907).

CONCLUSION

For these reasons and the reasons previously stated, t he petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 1985

ADDENDUM

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In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 10th day of October, 1985.

Heretofore came the Virginia State Bar, by William D. Dolan, III, its President, and N. Samuel Clifton, its Executive Director, and presented to the Court a petition approved by the Council of the Virginia State Bar, praying that Section IV of the Rules for Integration of the Virginia State Bar, Part Six of the Rules of Court, be amended by adding thereto Paragraph 17 to read as follows:

PARAGRAPH 17 – MANDATORY CONTINUING LEGAL EDUCATION RULE

The Virginia Supreme Court hereby establishes a Mandatory Continuing Legal Education Program in the Commonwealth of Virginia.

A. *Purpose.* Continuing professional education of lawyers serves to improve the administration of justice and benefit the public interest. Regular participation in Continuing Legal Education programs will enhance the professional skills of practicing lawyers, afford them periodic opportunities for professional self-evaluation and improve the quality of legal services rendered to the public. All active members of the Virginia State Bar shall participate in an additional amount of further legal study throughout the period of their active practice of law, and failure to do so shall result in their suspension from membership in the Virginia State Bar.

B. *Continuing Legal Education Board.* A Continuing Legal Education Board shall be established for the purpose of administering the program.

(1) Appointment: The Chief Justice of the Supreme Court shall appoint, after consultation with the Council, the members of the board who shall be members of the bar and twelve in number. One member shall be designated by the Chief Justice as Chairman and another as Vice-chairman. Members shall serve terms of three years each, except that, initially, four members shall be appointed for terms of one year, four for terms of two years and four for terms of three years. No member shall serve more than two consecutive terms but shall be eligible for reappointment after the lapse of one or more years following expiration of the previous term. The Executive Director of the Virginia State Bar shall be an ex-officio member of the board.

(2) Notice of Meetings/Quorum: The board shall meet on reasonable notice by the Chairman, Vice-chairman or the Executive Director. Five members shall constitute a quorum and the action of a majority of a quorum shall constitute action of the board.

(3) Powers: The board shall have those general administrative and supervisory powers necessary to effectuate the purposes of this Rule, including the power to adopt reasonable and necessary regulations consistent with this Rule. The Virginia State Bar shall have the responsibility for funding the board and for enforcing Mandatory Continuing Legal Education requirements.

The board shall specifically have the following powers and duties:

(a) To approve, on an individual basis, CLE programs and sponsors and publish a list of those

approved. The publication shall include the number of credits earned for completion of a particular program;

(b) To establish procedures for the approval of Continuing Legal Education courses, whether those courses are offered within the Commonwealth or elsewhere. These procedures should include the method by which CLE sponsors could make application to the board for approval, and if necessary, make amendments to their application;

(c) To authorize sponsors of Continuing Legal Education programs to advertise that participation in their program fulfills the CLE requirements of this Rule;

(d) To formulate and distribute to all members of the Virginia State Bar appropriate information regarding the requirements of this Rule, including the distribution of a certification form to be filed annually by each active member.

C. *Continuing Legal Education Requirements.*

(1) All active members of the Virginia State Bar shall annually complete a minimum of eight (8) credit hours of approved Continuing Legal Education courses, except those lawyers expressly exempted from the requirement by this Rule or by decision of the Continuing Legal Education Board.

(2) In order to provide flexibility in fulfilling the annual requirement, a one-year carryover of credit hours is permitted, so that accrued credit hours in excess of eight (8) may be carried forward from one year to meet the requirement for the next year.

However, no more than eight (8) credit hours may be carried forward to the next year.

(3) Each active member of the Virginia State Bar shall be responsible for ascertaining whether or not a particular course satisfies the requirements of this Rule. Each member should exercise discretion in choosing those approved programs which are most likely to enhance professional skills and improve delivery of legal services.

D. *Certificate of Attendance.*

(1) Each active member of the Virginia State Bar shall certify prior to, or no later than the time of, annual renewal of his license that such lawyer attended approved Mandatory Continuing Legal Education programs for the minimum number of hours during the previous reporting period. The failure to certify shall cause suspension of such lawyer's license to practice law. An untruthful certification shall subject the lawyer to appropriate disciplinary action.

E. *Exemptions.* Each active member of the Virginia State Bar shall comply with this Rule except as follows:

(1) A newly-admitted member shall be exempted from filing a certification for the reporting period in which he or she is first admitted.

(2) A member who has obtained a waiver for good cause shown, as may be determined by the board, shall be exempted from filing a certification for the reporting period for which the waiver is granted.

(3) An active member who has been admitted purusant to Va. Code § 54-42.1(2a) for the practice of pa-

tent, trademark, copyright, and unfair competition causes shall be exempted from filing a certification.

F. *Reactivation.* Any member who changed his or her membership to active status shall complete eight (8) credit hours of Continuing Legal Education within 12 months of such lawyer's return to active membership.

G. *Credits.*

(1) Credit will be given only for Continuing Legal Education courses or activities approved by the board.

(2) Hours in excess of the minimum requirements defined in this Rule may not be carried forward for credit beyond the one year provided for in the Rule.

(3) Credit will not be given for Continuing Legal Education hours accumulated prior to admission to the Virginia State Bar.

(4) Credit shall be given to active members of the Virginia State Bar who prepare course materials and who personally participate as instructors. The credit, as determined by the Board, will reflect the time reasonably required for preparation of materials, as well as the actual time spent instructing.

H. *Standards.* The board shall evaluate, and where appropriate, approve, those programs which serve to satisfy the requirements of this Rule. In evaluating the specific programs, the board shall consider the following factors:

(1) Whether the course tends to increase the participant's professional competence as a lawyer.

(2) The number of hours of actual presentation, lec-

ture, or participation, so that the appropriate number of credit hours can be identified and published.

(3) The usage of written educational materials which reflect a thorough preparation by the provider of the course, and which assist course participants in improving their legal competence.

(4) The inclusion of a course in legal ethics and professional responsibility.

Upon consideration whereof, it is ordered that the Rules for Integration of the Virginia State Bar, Part Six of the Rules of Court be, and the same are hereby, amended in accordance with the prayer of the petition aforesaid, effective July 1, 1986.

A Copy,
Teste:

/s/ David B. Beach
Clerk